

**PUBLIC COMMENT DRAFT 6/24/04  
NOT YET APPROVED BY THE CITY ATTORNEY**

**City of Houston, Texas, Ordinance No. 2004 - \_\_\_\_\_**

**AN ORDINANCE AMENDING CHAPTER 40 OF THE CODE OF ORDINANCES, HOUSTON, TEXAS, BY ADDING A NEW ARTICLE XVIII RELATING TO REQUIRING THE OWNERS OF UTILITY FACILITIES LOCATED WITHIN PUBLIC RIGHTS-OF-WAY TO RELOCATE THEIR FACILITIES TO ACCOMMODATE PUBLIC WORKS CONSTRUCTION PROJECTS; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY.**

\* \* \* \* \*

**WHEREAS**, the City of Houston is a home-rule municipality having the full power of local self-government under Article XI, Section 5, of the Texas Constitution; and

**WHEREAS**, a home-rule municipality may exercise its governmental authority independently of the powers expressly granted to it by state statutes; and

**WHEREAS**, Section 283.056 of the Texas Local Government Code authorizes a municipality to exercise police-power based regulations in the management of the public rights-of-way to the extent necessary to protect the health, safety and welfare of the public; and

**WHEREAS**, the Constitutional provisions and statutes collectively recognize the authority and inherent control of the City over its streets and public rights-of-way, which have historically included the authority to require the relocation of utility improvements located therein, at the expense of the owner of such facilities, to accommodate the construction of public improvement projects in such areas; and

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**WHEREAS**, the City is the authority primarily responsible for constructing and maintaining essential public works facilities, including streets and water, sewer and storm drainage facilities, most of which are located in public rights-of-way under the jurisdiction and management of the City; and

**WHEREAS**, the construction and maintenance of these public works are necessary and essential to protect the health, safety and welfare of the public; and

**WHEREAS**, facilities other than City public works are often located within the public right-of-way and frequently interfere with the construction and maintenance of the streets and other public works projects; and

**WHEREAS**, the City Council finds that experience has demonstrated that the relocation of utility improvements to accommodate public construction projects at the City's request are often not timely completed, resulting in construction delays that prolong the completion of City projects, increase City and City contractor costs on public improvement contracts, and subject the City to contractual delay damages; and

**WHEREAS**, neither the Texas Constitution nor Texas statutes prescribe rules or procedures to ensure that utility facilities located in, on or under public streets and rights-of-way will be relocated in a timely and efficient manner to accommodate City public works projects, but do authorize the City to adopt such rules and procedures; and

**WHEREAS**, the City Council hereby finds that the public health, safety and welfare require the adoption of procedures to ensure the prompt and efficient relocation of utility

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facilities located in public streets and rights-of-ways; **NOW, THEREFORE;**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:**

**Section 1.** That the recitals and findings contained in the preamble of this Ordinance are hereby determined to be true and correct and are hereby adopted.

**Section 2.** That Chapter 40 of the Code of Ordinances, Houston, Texas, is hereby amended to by adding a new Article XVIII to read as follows:

**“ARTICLE XVIII. RELOCATION OF PRIVATELY-OWNED FACILITIES**

**Sec. 40-381. Definitions.**

As used in this article, the following terms shall have the meanings ascribed in this section, unless the context of their usage clearly indicates another meaning:

*Facility* means any structure, device or other thing whatsoever that is installed or maintained in, on, within, under, over or above the public rights-of-way within the city.

*Public works project* means any construction, reconstruction, improvement, repair or maintenance project undertaken by or on behalf of the city, including but not limited to projects included on the City's capital improvement plan regardless of source of funding.

*Relocate* means to move, remove or replace a facility.

*Right-of-way* means public streets or other rights-of-way; including the entire area between the boundary lines of every public way (including but not limited to roads, streets, alleys, highways, boulevards, bridges, tunnels or similar thoroughfares, and public utility easements) under the control of the city, whether acquired by use, purchase, grant, or dedication and acceptance by the public, or that has been opened to the use of the public for purposes of vehicular travel; and shall include any designated state or federal highway or road or any designated county road under the control of the city for

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maintenance, repair, or vehicular traffic control purposes. 'In the right-of-way' means across, along, under or over a right-of-way.

**Sec. 40-382. Relocation required.**

Whenever the city engineer determines, in the exercise of sound engineering judgment, that a facility should be relocated for the accomplishment of a public works project, the owner of the facility shall timely relocate the facility at the owner's sole expense. In the event that an owner's failure to timely relocate a facility causes the city or a cooperating entity undertaking a public works project to incur expenses, damages or losses, including loss of grant funds, for any resulting delay, the owner of the facility shall be responsible for the expenses, damages or losses.

**Sec. 40-383. City engineer's preliminary notice.**

When during the design of a public works project the city engineer determines that presence of a facility in a right-of-way may interfere with a public works project so that the relocation of the facility may be necessary, the city engineer shall provide the owner of the facility notice in writing of the planned public works project. The city engineer shall make this determination upon receipt of a preliminary engineering report for the public works project and shall give the notice to the owner as soon as practicable thereafter. The notice shall be given by letter deposited into the United States postal service, postage paid. The notice shall identify the public works project and provide the owner with an opportunity to discuss the public works project and design alternatives that could avoid facility relocation.

**Sec. 40-384. City engineer's final determination and notice.**

(a) The city engineer shall determine before completion of final design of a public works project whether the design of the public works project requires relocation of a facility and shall provide notice to the owner of any facility required to be relocated of his determination. The notice shall be given by letter deposited into the United States postal service, postage paid. In making determinations pursuant to this section, the city engineer and the director of public works and engineering, as applicable, shall consider the purpose of the public works project, the timetable for construction, the complexity of the public works project, the number of

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facilities potentially affected by the project, the number of facility relocations required for the project, the cost and complexity of relocating each facility and any other factors he determines in the exercise of sound engineering judgement are relevant to the public works project. While it shall be a policy of the city to design public works projects to minimize relocation of facilities, the city shall not be obligated to design a public works project to avoid facility relocation and the determination of the city engineer of the appropriate design of the public works project shall be final.

(b) If the city engineer determines prior to completion of final design that relocation of a facility is not necessary but discovers during the construction of the public works project that inaccurate information about the location of the facility was provided and relocation is required, the city engineer shall give notice of the necessity for relocation pursuant to subsection (a) of this section.

(c) The owner of the facility shall have a period of 60 days following the date of the notice sent pursuant to subsection (a) of this section to submit a proposed schedule for relocation of the facility for approval by the city engineer. The city and the owner may enter into a memorandum of agreement, in a form approved by the city attorney, evidencing agreement on the relocation schedule. The city engineer for good cause may extend, for a period not to exceed an additional 60 days, the time for negotiation of a relocation schedule.

(d) No schedule for the relocation of a facility shall provide a period for relocation of longer than 180 days without written approval of the director of the public works and engineering, who for good cause shown by the facility owner, may extend the period of time for relocation.

**Sec. 40-385. Relocation authorized; other legal action.**

(a) If upon the expiration of 60 days from the date of the city engineer's notice to the owner pursuant to subsection 40-384(a) of this Code, or any extension of time approved by the city engineer, the city and the owner have not agreed upon a schedule for the relocation of the facility at the owner's expense, the city engineer is authorized to:

(1) Refer the matter to the city attorney for appropriate legal

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action; or

- (2) Complete the relocation of the facility, or cause the relocation of the facility to be relocated, on behalf of the owner and recover the cost of the relocation from the owner.

(b) If the city engineer determines that the owner has not timely complied with the terms of an agreed relocation schedule and that the unfinished relocation of the facility will delay completion of the affected city project, the city engineer is authorized to:

- (1) Refer the matter to the city attorney for appropriate legal action; or
- (2) Relocate the facility, or cause the facility to be relocated, on behalf of the owner and recover the cost of the relocation from the owner.

(c) Failure of a facility owner to provide a relocation schedule satisfactory to the city engineer within the initial 60 day period, or any extension thereof, shall constitute authorization for the city to assess damages, including expenses, damages or losses for project delay, and recover costs of relocating the facility from the owner and shall also constitute a waiver by the owner of any claim for damages against the city.

(d) Failure of a facility owner to comply with an agreed relocation schedule shall constitute authorization for the city to recover damages, including expenses, damages or losses for project delay, and recover costs of relocating the facility from the owner and shall also constitute a waiver by the owner of any claim for damages against the city.

(e) All relocations required under this article shall be at the sole expense of the owner of the facility.

(f) The city engineer's certification of the costs of relocation of any facility undertaken on behalf of an owner shall constitute prima facie evidence of the reasonableness of the costs chargeable to the owner.

**Sec. 40-386. Notice after relocation.**

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If a facility is relocated under section 40-385 of this Code, the city engineer shall, within 30 days of the completion of the relocation, notify the owner of the facility that is relocated of the owner's right to a hearing under section 40-387 of this Code.

**Sec. 40-387. Hearing upon written request.**

The owner of a facility that is relocated under section 40-385 of this Code shall, upon written request within 10 days from the mailing of the city engineer's notice under section 40-386 of this Code, be entitled to a hearing on the issue of the reasonableness of the city's costs of relocation. The hearing shall be conducted by a hearing officer designated by the director of public works and engineering, and the director shall promulgate rules for hearings. The hearing officer's decision on the issue of the reasonableness of the city's costs of relocation is final.

**Sec. 40-388. Conflicts.**

The provisions of the Article IX of Chapter 40 of this Code shall control for those facilities governed thereby to which this article would otherwise apply.

**Sec. 40-389. Actions authorized to enforce article.**

The city attorney is authorized to institute appropriate civil proceedings to compel the relocation of any facility whose relocation the city engineer determines to be necessary for a public works project and seek other relief consistent with this article."

**Section 3.** That if any provision, section, subsection, sentence, clause, or phrase of the Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that

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no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

**Section 4.** That there exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect immediately upon its passage and approval by the Mayor.

**PASSED AND APPROVED this \_\_\_\_ day of \_\_\_\_\_, 2004.**

\_\_\_\_\_  
Mayor of the City of Houston

Prepared by Legal Dep't. \_\_\_\_\_  
DFM:dfm June 23, 2004 Senior Assistant City Attorney  
Requested by: Jon C. Vanden Bosch, P.E.  
Director, Department of Public Works & Engineering  
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